In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 276

REED R. MAXFIELD AND JOHN R. CHRISTOPHER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A 29–41) is reported at 360 F. 2d 97.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1966. On May 24, 1966, Mr. Justice White extended the time in which to file a petition for a writ of certiorari to and including June 21, 1966, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were properly convicted on counts of an indictment charging substantive viola-

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tions when they were acquitted on a conspiracy count.

2. Whether the evidence was sufficient to support the conviction of petitioner Maxfield.

3. Whether the court properly admitted into evidence a deposition of petitioner Christopher with instructions that it be considered only against the declarant.

4. Whether there was error in the jury instructions.

STATEMENT

Petitioners were charged in the United States District Court for the District of Utah with various offenses resulting from a scheme to defraud. The first eight counts charged them with the use of the mails in a fraudulent scheme to sell securities (15 U.S.C. 77q); Counts 9 and 10 charged mailings in execution of a scheme to defraud (18 U.S.C. 1341); and Count 11 charged a conspiracy to commit the offenses in the first ten counts (18 U.S.C. 371). After a trial before a jury, petitioners were convicted on the first eight counts and acquitted on the remaining three counts. The convictions were affirmed by the court of appeals.

The existence of a scheme to defraud is not challenged here although petitioner Maxfield contends he was unjustly found guilty of misdeeds chargeable to Christopher. In brief, the evidence showed that petitioner Maxfield was president and chairman of the board of Uinta Finance Company (Tr. 1517–1518, 573). In October, 1958, he and others formed the Uinta National Life Insurance Company of which he also became president. This company was formed with an initial capital stock of $135,000, of which

$125,000 consisted of stock that Maxfield had purchased by borrowing that sum from the finance company (Tr. 229–233, 238, 654). On January 19, 1959, Maxfield sold 242,000 units of his insurance company stock to the finance company for $242,000 (Tr. 246).

In early 1959, Maxfield negotiated with a broker to resell some of the insurance company stock that had been sold to the finance company. Maxfield said that petitioner Christopher would help to sell the issue. The broker refused, informing Maxfield that an attorney had advised him not to participate in the sale of this stock (Tr. 1012–1016).

In March, 1959, Christopher and others organized a corporation, Western States Underwriters, to sell securities (Tr. 840–841). Christopher had previously been the sales manager for Uinta Finance and Uinta Insurance when the stock of those companies was sold directly to the public (Tr. 88–89). The principal assets of Western Underwriters were 1,200 units of Uinta National Insurance Company stock which Christopher had borrowed from Maxfield (Tr. 456–460, 944–947). Western Underwriters entered into a contract with the finance company to sell part of the insurance stock which had been obtained from Maxfield (Tr. 293, 301–306).

Western Underwriters then commenced selling this Uinta Insurance stock to the public, using salesmen who had previously worked under Christopher (Tr. 91) and sales promotion kits that had been prepared earlier for Maxfield (Tr. 199–202, 207). The commissions from these sales were, except for one small amount, Western's only source of income. The stock

was usually sold to prior investors in Uinta stock at $1.35 per unit, $1.14 of which went to the finance company (Tr. 448–451). These stockholders were solicited with false representations that there had been an increase in the value of the stock and that, as prior investors, they had a special right to purchase some additional stock which would be forfeited if not exercised. They were not informed that the stock offered for sale was formerly owned by the president of the insurance company and had been sold to the finance company (Tr. 56–58, 77–80). Western sold a total of $182,000 of insurance stock. Of this amount, $96,140 of fully paid stock was issued to investors, $54,810 was fully paid but not delivered and $28,566 was partially paid and not delivered (Tr. 1139–1140).

ARGUMENT

1. Petitioners are not entitled to have their convictions on the eight substantive counts set aside merely because the jury acquitted them on the conspiracy count. *Dunn* v. *United States,* 284 U.S. 390; *United States* v. *Dotterweich,* 320 U.S. 277. Since the *Dunn* decision, there has been no conflict among the courts of appeals in this regard. See, *e.g., United States* v. *Dolasco,* 184 F. 2d 746, 749 (C.A. 3); *Canaday* v. *United States,* 354 F. 2d 849, 855–856 (C.A. 8).

2. The evidence against petitioner Maxfield was sufficient even though Christopher and Western States Underwriters made the stock sales to the public. Maxfield was interested in disposing of the stock and he aided Christopher in setting up Western. In addi-

tion, Maxfield knew that the stock which he had recently sold to the finance company for $1.00 per unit was to be immediately resold to the public for more than $1.14 per unit. From these circumstances the jury was justified in concluding that Maxfield understood that the salesmen of Western States would not disclose that they were reselling insurance company stock that had belonged to Maxfield and that they would make false representations to potential customers in order to market the stock at an appreciated price.

3. On September 27, 1960, petitioner Christopher's deposition was taken during the course of an investigation by the Securities and Exchange Commission (Tr. 1290–1350). Christopher was represented by an attorney and was advised that he could refuse to answer questions (Tr. 1291). After holding an extensive hearing (Tr. 1159–1252), the trial judge found that his statements were voluntarily made (Tr. 1253–1259). This deposition was then admitted into evidence, against Christopher only, at the close of the government case-in-chief (Tr. 1287–1289).[1]

The contention of Christopher that his deposition should have been excluded was properly denied. Since there was no custodial interrogation, *Miranda* v. *Arizona* (miscited as *Katzenbach* v. *Morgan*), Nos. 759, 760, 761 and 584, O.T. 1965, decided June 13, 1966, has no application here. In addition, Christopher was represented by counsel and was advised that his statements might be used against him.

[1] The jury was instructed to disregard the statement even as to Christopher unless they found that it was voluntary (Tr. 1290).

Nor was the introduction of Christopher's statement error as to Maxfield. Before this deposition was introduced against Christopher, the government had presented all of its evidence against Maxfield. Both at the time the deposition was admitted and in the court's final instructions, the jury was instructed that this statement was not admissible against Maxfield (Tr. 1287–1288, 1789). See *Delli Paoli* v. *United States,* 352 U.S. 232. Moreover, Maxfield's position as president of the two Uinta companies and his interest in the sale of the stock gave him a clearly defined role in the scheme, which eliminated any serious possibility of confusion in the jury's mind.

4. In detailing the false representations charged in the indictment, the trial judge included the allegation that Western States had represented to investors that state law compels insurance companies to invest assets "in United States bonds or securities which the state considers just as safe" (Tr. 1770). Petitioners, who did not except to this instruction, contend that a misrepresentation of law cannot be a basis of fraud. However, it has been held that misrepresentations of law in a mail fraud case may form the basis of a criminal prosecution. *Lesselyoung* v. *United States,* 18 F. 2d 472 (C.A. 8), certiorari denied, 275 U.S. 535. In any event, as the court of appeals held, this particular representation was not singled out for emphasis and there was therefore no plain error.

Finally, since Maxfield's guilt depended upon his knowing participation in the fraudulent scheme and not solely upon his control of Western Underwriters, the court correctly refused to instruct the jury that

they might consider the false representations as against Maxfield only if they first found that he "possessed the power to direct or to cause the direction of the management policies of Western States Underwriters, Inc." (Pet. 12, see also Pet. 26–27). The trial judge correctly instructed that "[w]hile it is not necessary for the Government to show that in all respects and at all times the defendant Maxfield was and continued in control of the Western States Underwriters, it is essential for the Government to show beyond a reasonable doubt * * * that he devised a plan or scheme or agreed to such plan or scheme to utilize Western States Underwriters to effectuate through false representations a plan to dispose of the stock to the public" (Tr. 1791).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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